Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: October 28, 1997
CASE NO: 95-INA-605

In the Matter of:

SIZZLER RESTAURANT
Employer

On Behalf of:

LUIS ENRIQUE AVALOS-SIMENTAL
Alien

Appearance: Susan M. Jeannette
Del Mar, CA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On October 28, 1993, Sizzler Restaurant ("employer") filed an application for labor certification to enable Luis Enrique Avalos-Simental ("alien") to fill the position of Cook at a hourly wage of $8.00 (AF 41). The job duties are described as follows:

> Cook to work dinner shift preparing all standard menu items with emphasis on various cuts of steak and seafood. Oversee the overall performance of his line cooks and prep cooks and personally see that each plate prepared is done [with] the exactness and quality of the Sizzler chain. Must have full use and knowledge of standard restaurant equipment and utensils. Must handle inventory control for his shift (AF 17).

The job requirement is two years of experience in the job offered or a related occupation, and the special requirements specified that applicants "must speak English/Spanish as the kitchen help only speak(s) Spanish and management only speaks English. No written translation is required. Must have Food handler's card and supervisorial experience."

On March 7, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO alleged that the employer violated § 656.21 (b) (2) (i) (A) (B) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States; and be defined in the Dictionary of Occupational Titles (DOT). Specifically, the CO objected to the requirement that applicants have the ability to communicate in Spanish. The CO therefore requested the employer to: (1) delete the foreign language requirement and retest the labor market, or (2) justify the requirement as a business necessity (AF 12). The CO also found the employer in violation of § 656.24 (b) (2) (ii) which provides that a U.S. worker shall be considered able and qualified for the job if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation. Specifically, the CO took issue with the employer's rejection of Applicant McCallister.

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

In its rebuttal, dated March 11, 1995, the employer argued that the Spanish requirement arises out of business necessity. In support of this argument, the employer pointed out that the restaurant is located in San Diego County where Hispanics dominate the labor force in restaurant kitchen jobs (AF 9). The employer also argued that it has "always had Hispanics working in our kitchen and we need a cook that can give orders in their native language" (AF 9). The employer also contended that Applicant McCallister was recruited in good faith, and was only rejected after he failed to appear for his scheduled interview.

The CO issued the Final Determination on October 28, 1994 denying the labor certification. The CO reiterated the reasons listed in the NOF and found that the employer did not adequately rebut the issues therein. On November 30, 1994, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1).

Discussion

The issues presented by this appeal are whether the Spanish language requirement is an unduly restrictive requirement under § 656.21 (b) (2), and whether the employer recruited U.S. workers in good faith as required by § 656.24 (b) (2) (ii).

Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. Restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT, and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 28, 1994). *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*).

Section 656.21 (b) (2) (i) (C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising out of business necessity. The business necessity standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable to a foreign language requirement. *See Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc*). As the *Information Industries* standard has evolved in relation to foreign language requirements, the first prong generally looks to whether the employer's business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the employer's business involves the foreign language. The second prong generally examines whether the employee's job duties require communicating or reading in a foreign language.

The employer contends that the Spanish language requirement arises out of business necessity because Hispanics dominate the restaurant industry in the San Diego area. The employer further states that the restaurant work force in the San Diego area is largely comprised

of people crossing the border from Mexico for better paying jobs which has resulted in an influx of able bodied Hispanic workers. Thus, the employer argues that kitchen workers must be able to speak both Spanish and English to communicate with co-workers and managers. Finally, the employer submits that Hispanics comprise 22% of the overall population of San Diego (AF 2). Even if we were to accept the employer's statements, the employer's evidence still fails to meet the *Information Industries* standard. The employer never states what percentage of its business involves the use of Spanish, nor does it show that the cook's job duties require communicating in Spanish. In fact, it seems readily apparent that a cook could perform the job duties as listed on the certification application without the use of Spanish at all. Since the employer has failed to demonstrate business necessity, we find it unnecessary to examine the good faith recruitment issue, and conclude that the employer's application for certification must be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.